**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **MATTHEW T. DICKEY**<br>Claimant | ) | |
| VS. | ) | |
| **RELIANT PHARMACEUTICALS, INC.**<br>Respondent | ) | Docket No. 1,026,150 |
| AND | ) | |
| **VIGILANT INSURANCE CO.**<br>Insurance Carrier | ) | |

# ORDER

## STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the April 26, 2007, Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler. James R. Shetlar, of Overland Park, Kansas, appeared for claimant. Jeff S. Bloskey, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered injuries from an accident that arose out of and in the course of his employment with respondent on January 3, 2005. Although notice and written claim were set out as issues in the Preliminary Hearing transcript, the ALJ's Preliminary Decision did not address those issues. Those issues were raised at the preliminary hearing, and because the ALJ awarded benefits, it is implicit in his order that he found the claim compensable. Therefore, by implication, the ALJ must have determined that claimant provided respondent with timely notice and written claim.

The record is the same as that considered by the ALJ and consists of the transcripts of the February 15, 2007,[1] Preliminary Hearing and the exhibits and the April 12, 2007,

[1] The ALJ's Preliminary Decision states the first preliminary hearing was held on January 19, 2007, but the transcript of hearing is dated February 15, 2007.

Continuation of Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

## ISSUES

Respondent contends claimant's accident of January 3, 2005, did not arise out of and in the course of his employment. In the event the Board finds that claimant's accident did arise out of and in the course of his employment, respondent contends that claimant failed to provide the statutory notice of his alleged injury. Respondent argues that although it knew of claimant's automobile accident on January 3, 2005, claimant did not inform respondent that he was working at the time he was involved in the accident. Respondent was not informed that claimant was claiming his accident was work related until July 2005. Respondent does not raise written claim as an issue for the Board's review.

Claimant argues that there is substantial evidence that claimant was within the course of his employment when he was injured on January 3, 2005, and that he gave notice to his supervisor, Dan White, the same day. Claimant contends the decision of the ALJ should be affirmed.

The issues for the Board's review are:

(1) Did claimant's accident and injuries of January 3, 2005, arise out of and in the course of his employment at respondent?

(2) Did claimant provide timely notice of accident to respondent?

## FINDINGS OF FACT

In August 1999, claimant began working for respondent as a sales representative in the Kansas City area. His job required him to call on physicians to educate them about respondent's products and make samples available to them. He worked out of his home and was provided a company vehicle. Part of claimant's responsibilities included following respondent's procedures and policies concerning filling out call cards and the use of the Victor (IVR) system. The IVR system is an automated call-in system where sales representatives make a record of sales calls made to doctors, pharmacies, or health care providers. According to Dan White, respondent's district sales manager and claimant's supervisor, all sales calls were to be called into the IVR system, whether or not drug samples were left with the customer. Claimant claimed it was not necessary to report sales calls to the IVR system if drug samples had not been left with a customer. He did not always call into the IVR system if he did not leave drug samples with a physician.

In May 2004, Mr. White and claimant had a discussion concerning claimant's reporting practices.

Claimant testified concerning the meeting:

Q. [by Respondent's Attorney] You told me during your deposition after that discussion in May of '04 with Mr. White that you diligently and religiously complied with the procedures in terms of filling out call cards when you saw physicians and when samples were left, correct?

A. [Mr. White] I never said diligently and religiously. I said Dan and I had an agreement that [I] would send them in on a certain frequency, and after a week he was happy and I was happy and everything was . . .

Q. But you complied going forward with all of the policies and procedures with filling out call cards?

A. Correct.

Q. You complied with company procedures with using the [IVR] system, correct?

A. Correct.[2]

Mr. White testified:

Q. [by Respondent's Attorney] It's my understanding you had a meeting with [claimant] sometime in the late spring or early summer of 2004, which would have been before he went out on disability.

A. [Claimant] Yes.

Q. What was the nature of that meeting?

A. I had had performance issues with [claimant] and he had problems with his sample accountability.

Q. Performance issues, can you be a little more specific?

A. Putting his calls in on a more timely basis and getting his paperwork in.

Q. Administrative issues?

A. Yes.

Q. Tell me about the discussion you had with [claimant] at that time.

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[2] P.H. Trans. (Feb. 15, 2007) at 41.

A. From my recollection when I first sat down with [claimant], he was a little nervous and he asked me, you know, please, he needed this job, don't fire him, he's going to do what it takes, you know, to get the ball rolling. Being a compassionate man of nature, I said, you know, that's all you have to do is get the work in and get things in on a timely fashion and we would have no problem.

Q. Did you make a point at that time of directing [claimant] to comply with the company rules and policies with respect to recording sales calls and recording samples left?

A. Yes, I did.

Q. Did that include the use of the IVR system?

A. Yes, it does.

Q. Would you agree with me that since the Reliant sales representatives had goals of making ten sales calls per day that all sales representatives had every motivation for calling in and reporting every sales call to the IVR system?

A. Yes.

Q. [Claimant], as of December of 2004, knew that his job was on the line.

A. Yes.

. . . .

Q. Would you agree with me that [claimant] certainly had every motivation for reporting every single sales call he made on the IVR system?

A. Yes.[3]

All claimant's call cards for January 12 and 14, February, and March 2005 were on the IVR reporting system.

Claimant was required to fill out call cards whenever he left a drug sample with a doctor or medical provider. He was not required to fill out a call card if he did not leave drug samples with a customer. Call cards are routinely changed. Version 18 cards were to be used after January 1, 2004. After July 1, 2004, Version 19 cards were to be used, and after January 1, 2005, Version 20 cards were to be used. When a new version was introduced, all prior versions were to be destroyed. However, claimant stated that he often used up cards from old versions. And even if claimant did not leave drug samples with a doctor, he sometimes would fill out a call card.

[3] P.H. Trans. (Apr. 12, 2007) at 16-18.

In August 2004, claimant was diagnosed with hepatitis C and tuberculosis. He took time off work under the Family Medical Leave Act (FMLA) in September 2004. On December 22, 2004, claimant received a letter from Donna Pasek, senior manager of respondent's Human Resources Department, advising him that his FMLA leave expired on November 22, 2004, and that unless he returned to work on or before January 4, 2005, he would be replaced. Upon receiving the letter, claimant states he called Ms. Pasek and Sophia Dunn from human resources, advising he would return to work on January 3. In affidavits, both Ms. Pasek and Ms. Dunn denied receiving any telephone calls, messages, or correspondence from claimant between December 2004 and January 4, 2005, indicating when he would return to work for respondent.

Claimant also states he contacted his supervisor, Mr. White, soon after receipt of the letter from Ms. Pasek, telling him he was returning to work. Claimant indicated that Mr. White told him to update his expense reports and automobile mileage and to fax him a doctor's release. However, Mr. White denied having a conversation with claimant about when he was going to return to work.

On January 3, 2005, claimant contends he left home at 8:15 a.m. and drove his company car to a medical clinic. He talked to some staff and physicians at the medical clinic and filled out at least four call cards. He left at 10:15 and drove home to retrieve some literature, handouts and samples. After picking up those items, he started to drive to other physicians' offices but was involved in an automobile accident. He sustained injuries to his face, neck and shoulder as a result of that automobile accident.

After the accident, claimant called Mr. White and left a voice mail message. He then called respondent’s home office and spoke with the fleet administrator, Anne O'Neill. He told Ms. O'Neill that he had minor, nonlife-threatening injuries but that the company car had been destroyed. Ms. O'Neill gave him instructions on replacing the company car temporarily with a rental car. Ms. O'Neill told claimant to notify the Human Relations Department about the accident. Claimant said he tried to call that department but was unable to reach anyone. He left a message for Ms. Pasek.

On January 4, 2005, Mr. White picked up a voice mail message at his office from claimant where claimant said he had been in a car accident and was unable to work due to a fractured skull and an injured shoulder. After listening to the voice mail message, Mr. White contacted claimant. Claimant did not tell him that he was working at the time he was involved in the motor vehicle accident of January 3, 2005. Mr. White contacted claimant again on January 10, 2005, and again claimant did not say that he had been injured while working. Mr. White made notations on his calendar of his conversations with claimant on January 4 and January 10 because the accident involved a company car. Those calendar pages were introduced as exhibits and do not indicate a notation that claimant was working at the time of the accident. Mr. White said if claimant had told him he was working he would have made a notation to that effect. During the time from January 3, 2005, until claimant stopped working for respondent, claimant never informed him that he had been

working at the time of the accident. Claimant submitted a written claim for compensation to respondent dated July 20, 2005.

Claimant did not seek medical treatment for his injuries until the fall of 2005 because he knew he did not have life-threatening injuries, he did not have his new insurance card, and he was seeing a doctor once a week for his hepatitis and tuberculosis and was told he could not have surgery on his shoulder until he finished taking the medicine for the hepatitis and tuberculosis. However, in September or October 2005, he went to doctors from the Kansas University Medical Center. No one at respondent authorized treatment for the injuries from the automobile accident. At the preliminary hearing, claimant requested additional treatment as it pertained to his shoulder.

Mr. White believes that claimant was not working on January 3, 2005, for several reasons: (1) January 3, 2005, was a company holiday, and respondent's employees were not expected to work on that day; (2) claimant did not tell Mr. White that he would be returning to work on January 3, 2005; (3) claimant did not tell Mr. White during conversations on either January 4, 2005, or January 10, 2005, that he had been working at the time of the automobile accident on January 3, 2005; (4) claimant did not call in any report of sales calls to the IVR system for January 3, 2005, even though claimant made calls to the IVR system for sales calls claimant made on January 12 and 14 and any January 3 sales visits could have been reported at the same time; (5) Although claimant filled out at least four call cards indicating visits with physicians on January 3, 2005, he used Version 18 call cards instead of the correct version.

Respondent introduced a letter from Dr. Anthony Buren, one of the doctors claimant claims to have visited on January 3, wherein Dr. Buren stated he signed the call card on December 9, 2004, not on January 3, 2005.

Claimant argues that no evidence was introduced from the other doctors denying his sales visits and his testimony and the call cards are uncontradicted evidence that he worked on January 3, 2005.

## PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

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[4] K.S.A. 2005 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

K.S.A. 2006 Supp. 44-501(a) provides that claimant has the burden of proof:

> In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2006 Supp. 508(g) states: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

By statute, preliminary hearing findings, conclusions and orders are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to having been determined by the entire Board, as it is when the appeal is from a final order.[8]

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[6] *Id.* at 278.

[7] K.S.A. 44-534a.

[8] K.S.A. 2006 Supp. 44-555c(k).

## ANALYSIS

Claimant contends he had returned to work and was making sales calls on the date of accident, January 3, 2005. However, he did not report any sales calls on the company's IVR system as required. Claimant contends this was not unusual when he did not leave samples. But claimant had been counseled by his supervisor, Mr. White, in May 2004 about the need for claimant to put his calls into the system on a timely basis. Claimant had promised to be compliant with the company rules and procedures about reporting calls. Furthermore, as sales representatives had goals of making ten calls per day, it was to claimant's advantage to record all of the calls he made in the IVR system, regardless of whether he left samples.

Claimant testified that he complied with all company policies after the May 2004 meeting with Mr. White. The claimant's call records for January 12 and 14, 2005, as well as those for February and March appeared complete and corresponded with all of claimant's call cards. This makes the absence of IVR system reports for calls made on the date of accident all the more unusual. It was not logical for claimant not to follow the company procedure and report all calls on the IVR system when he had been warned about the need to do so and claimant said he felt his job was on the line. Claimant's explanation that he did not believe it to be necessary does not square with his supervisor's testimony and does not square with the evidence that after the accident claimant complied with this procedure.

January 3, 2005, was a company holiday. Mr. White, Ms. Pasek and Ms. Dunn deny that claimant contacted them before January 3, 2005, and told them he was returning to work. Furthermore, the medical records suggest that claimant did not seek the required doctor's release until January 11, 2005. Finally, Dr. Buren denies that he saw claimant on January 3, 2005, as claimant alleged.

The greater weight of the credible evidence does not support claimant's allegation that he was working on January 3, 2005.

## CONCLUSION

Based on the record compiled to date, claimant has failed to prove that his January 3, 2005, automobile accident arose out of and in the course of his employment with respondent. Because of this finding, the issue of timely notice is rendered moot.

## AWARD

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated April 26, 2007, is reversed.

**IT IS SO ORDERED.**

Dated this _____ day of August, 2007.

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BOARD MEMBER

c: James R. Shetlar, Attorney for Claimant
Jeff S. Bloskey, Attorney for Respondent and its Insurance Carrier
Robert S. Foerschler, Administrative Law Judge